Filed 4/10/09 In re E.G. CA5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re E.G., a Person Coming Under the Juvenile Court Law.	
FRESNO COUNTY DEPARTMENT OF CHILDREN & FAMILY SERVICES, Plaintiff and Respondent, v. C.J., Defendant and Appellant.	F056515 (Super. Ct. No. 05CEJ300202-2) **OPINION**

THE COURT[*]

APPEAL from an order of the Superior Court of Fresno County. Jane Cardoza, Judge.

Michael B. McPartland, under appointment by the Court of Appeal, for Defendant and Appellant.

Kevin Briggs, Interim County Counsel, and William G. Smith, Deputy County Counsel, for Plaintiff and Respondent.

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* Before Vartabedian, A.P.J., Wiseman, J., and Gomes, J.

C.J. appeals from an order terminating her parental rights (Welf. & Inst. Code, § 366.26) to her young son, E.G.[1] She contends the court abused its discretion when it denied a second petition (§ 388) she brought in the hopes of obtaining reunification services or regaining custody. On review, we affirm.

PROCEDURAL AND FACTUAL HISTORY

When E.G. was 10 months old and in appellant's care, he suffered a burn on his lower back. Appellant neither had a reasonable explanation as to how her son sustained the burn nor sought prompt treatment for the burn. Unfortunately, this was not the first time an infant child of appellant's was burned. Two years earlier, her nine-month-old son, M., suffered second degree burns over 10 percent of his body. These injuries were attributed to appellant although she denied responsibility. M. was adjudged a dependent and removed from appellant's custody. Due to the severity of the harm she inflicted, appellant did not receive reunification services (§ 361.5, subd. (b)(5) & (6)) and eventually lost her parental rights to him. !(CT 3-5, 171, 249)!

It was against this backdrop that the Fresno County Superior Court exercised its dependency jurisdiction over E.G. pursuant to section 300, subdivisions (a) - serious physical harm inflicted nonaccidentally by a parent, (b) - failure to protect, and (j) - abuse of a sibling. In January 2008, the superior court adjudged E.G. a dependent child and removed him from parental custody. Although the court granted E.G.'s father reunification services, it denied appellant services pursuant to section 361.5, subdivision (b)(7) and (11). According to these provisions, a court need not offer reunification services to a parent if it finds, by clear and convincing evidence, the parent is not receiving services for a sibling or half sibling pursuant to certain grounds (§ 361.5, subd. (b)(3), (5) or (6)) and the parent's rights to a sibling or the half sibling have been

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[1] All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

terminated and the parent failed to subsequently make a reasonable effort to treat the problems leading to that child's removal.

As of the January 2008 hearing, appellant was participating in some services provided to her although she had not completed those services and was not drug testing. In addition, E.G. appeared to have a bond with appellant. However, appellant failed to accept any responsibility for either child's injuries.

E.B.'s father later failed to regularly participate in reunification efforts. Consequently, respondent Fresno County Department of Children and Family Services (department) recommended in the spring of 2008 that the court terminate the father's services and initiate permanency planning for E.G. Meanwhile, however, appellant completed a parenting course, a domestic violence class for victims, and substance abuse treatment and aftercare. She in turn petitioned (§ 388) the court to grant her reunification services.

Following a May 2008 evidentiary hearing, the court denied appellant's petition, terminated reunification services for the father, and set a hearing to select and implement a permanent plan (§ 366.26) for E.G. Although appellant initiated writ proceedings to review the court's setting order, this court dismissed that proceeding when appellant did not file a timely writ petition. (Dismissal order, F055364, *C.J. v. Superior Court*.)

In advance of the permanency planning hearing, the department submitted a "366.26 WIC Report" in which it recommended the court find E.G. likely to be adopted and order termination of parental rights. Although the child suffered from speech delays and emotional disturbance, his young age and his good physical health made him generally adoptable. Paternal relatives were also very committed to adopting him.

In addition, the department described E.G.'s relationship with appellant in its report. Since the January 2008 dispositional order, they visited one another once a month. During those visits appellant appeared to lack appropriate parenting skills and did

not exercise her authority as E.G.'s mother. When he misbehaved, she laughed and smiled as though it was funny. Meanwhile, E.G. constantly ignored her efforts at redirection. He also did not respond to her efforts to engage him in activities. He related to appellant, as a child might with an occasional babysitter, friend or extended family member.

As the permanency planning hearing approached, appellant filed a second petition (§ 388) for reunification services or an order returning E.G. to her care. She allegedly continued to participate in services she had been offered and had established an appropriate home for E.G. She also claimed a services or custody order would be in E.G.'s best interests because she consistently visited with him and demonstrated an ability to safely care for him.

The court conducted a combined hearing on appellant's modification petition and the department's permanency planning recommendations in October 2008. Appellant testified in support of her petition, claiming that since her previous petition she completed "[p]arenting, domestic violence, substance abuse, and . . . the after care" and had stable housing. She claimed she completed all of the services offered to her because she wanted her son back. She was trying to correct her mistakes. In his closing argument, appellant's trial counsel urged that the mistake to which appellant referred was not fighting harder during the prior dependency proceeding for her child, M. According to counsel, appellant consistently disputed she caused E.G.'s burn.

Following argument, the court denied appellant's petition for modification. It found there had been no showing of changed circumstances. In addition, appellant did not show it would be in E.G.'s best interests to enter a different order. Having also found it was likely E.G. would be adopted, the court terminated parental rights.

DISCUSSION

Appellant contends the court abused its discretion when it denied her modification petition because she satisfied both requirements of a section 388 petition, namely that there are changed circumstances and a modified order would promote the child's best interests. According to appellant, her circumstances had clearly changed since the January 2008 disposition when the court denied her reunification services because at that time she had not completed the services offered to her. Her modification petition, however, established she completed the offered services. In addition, relying on earlier evidence that E.G. was bonded with her, appellant contends she established either a reunification order or an order granting her custody of E.G. would be in his best interests.

Although appellant was entitled to petition to modify the court's prior orders denying her services and denying her first modification petition, it was her evidentiary burden to persuade the court to grant her the relief she sought. (*In re Audrey D.* (1979) 100 Cal.App.3d 34, 43.) She had to establish changed circumstances or new evidence (§ 388, subd. (a)) as well as show the proposed change, either an order for reunification services or an order returning custody, was in the child's best interests. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) Also, given the timing of her section 388 petition, that is on the eve of the permanency planning hearing, it was incumbent on her to show E.G.'s need for permanency and stability would be advanced by either of those proposed orders. (*Ibid.*)

As discussed below, we conclude appellant's argument is meritless. She neither established changed circumstances nor showed a modified order would be in E.G.'s best interests.

With regard to the changed circumstances issue, appellant first ignores the statutory grounds which the court cited in denying her reunification services. The court referenced section 361.5, subdivision (b)(7) and (11). As previously explained, these

provisions authorize the denial of services if a court finds, by clear and convincing evidence, the parent is not receiving services for a sibling or half sibling pursuant to certain grounds (§ 361.5, subd. (b)(3), (5) or (6)) and the parent's rights to a sibling or the half sibling have been terminated and the parent failed to subsequently make a reasonable effort to treat the problems that led to that child's removal.

Appellant mistakenly relies on the department's report that she had not completed services previously offered to her, as though this was a ground for denying her services. It was not. (See § 361.5, subd. (b).) Rather, the department was simply fulfilling its statutory duty to report on a parent's efforts once his or her child is detained. (§§ 361, subd. (e)(1) & 366, subd. (a)(1)(E).)

In any event, she also overlooks the department's evidence that she failed to accept any responsibility for the burns each of her sons sustained. This evidence was important to the department's proof under section 361.5, subdivision (b)(11) that she failed to subsequently make a reasonable effort to treat the problems leading to her first child's removal. As we mentioned earlier, even at the permanency planning hearing for E.G., appellant through her trial counsel continued to contest the finding that she burned the child.

Additionally, appellant ignores her first modification petition and her failure to introduce any evidence of changed circumstances since the court denied that earlier petition. It is true appellant testified in October 2008 that *since* her previous modification petition she had completed a parenting course, domestic violence services, and substance abuse treatment including after care. In fact, however, she had completed those programs at the time of her first modification petition. Also, those were not all the programs which had been recommended or offered to her. There was also anger management services offered of which she apparently did not take advantage as well as a concern that she

minimized her need for mental health treatment and needed another mental health evaluation.

Last, to the extent appellant relies on earlier evidence that E.G. was bonded to her, she overlooks the evidence in the department's "366.26 WIC Report" that they no longer shared a strong parent-child relationship. The child no longer responded to her in a positive way and instead related to her, as a child might with an occasional babysitter, friend or extended family member. Appellant also overlooked E.G.'s interests in permanence or stability at this stage. (*In re Stephanie M., supra,* 7 Cal.4th at p. 317.)

On this record, we conclude the superior court properly exercised its discretion by denying appellant's second modification petition. (*In re Stephanie M., supra,* 7 Cal.4th at p. 318.)

DISPOSITION

The order terminating parental rights is affirmed.